

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOY D. ADAMS

Claimant

VS.

PRESBYTERIAN MANOR, INC.

Self-Insured Respondent

Docket No. 1,051,734

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 24, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Joni J. Franklin, of Wichita, Kansas, appeared for claimant. Gary K. Jones, of Wichita, Kansas, appeared for the self-insured respondent.

The ALJ granted respondent's application to deauthorize treatment for claimant's low back complaints, finding that the greater weight of the evidence was that claimant had a preexisting low back condition and that her current low back condition was not caused, aggravated or intensified by her work injury of July 2, 2010.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 20, 2012, Preliminary Hearing and the exhibits; the deposition of Dr. Jeanette Salone taken January 8, 2013, and exhibits; the transcript of the November 8, 2011, Preliminary Hearing and the exhibits; the transcript of the April 6, 2011, Preliminary Hearing and the exhibits; and the transcript of the April 20, 2011, Continuation of Preliminary Hearing by Deposition with exhibits; together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that her current need for medical treatment to her low back was not related to her injury at work on July 2, 2010.

Respondent first contends the Board does not have jurisdiction over the issue in this appeal. Respondent also asserts claimant's brief should not be considered because it was not timely filed. In the event the Board finds it has jurisdiction over the issue in this appeal, respondent argues the ALJ correctly found claimant's current need for medical treatment

to her low back is not related to her work injury but is related to her significant preexisting low back condition.

Claimant's brief was received prior to the writing of this Order and was considered by this Board Member.

The issues for the Board's review are:

1. Does the Board have jurisdiction over the issue in this appeal?
2. If so, is claimant's current need for medical treatment to her low back related to her injury at work on July 2, 2010?

FINDINGS OF FACT

On July 2, 2010, claimant was injured while assisting a resident of respondent into a chair. Claimant fell and injured her neck, back, bilateral shoulders, bilateral arms, and chest. Claimant has received authorized treatment, including surgery, to each of her shoulders and her neck. She now asks for authorization to have treatment, including surgery, to her low back.

Claimant has a long history of low back pain. The record contains medical records from 2000 forward listing various episodes of low back pain. Those records also refer to a history of low back pain in 1995. Claimant admits seeing a chiropractor when she was in her 20s, although she claims the chiropractic treatment was for her neck. Claimant fell on ice at her home in January 2006 and suffered a contusion of the coccyx and lumbar spine area, for which she received treatment for several months. In May 2006, claimant was diagnosed with degenerative disc disease and possible discogenic pain in her low back and underwent a lumbar diskogram. Also, in April 2010, three months before the July 2, 2010, accident at work, claimant suffered an injury to her low back while helping her husband, for which she was taken off work a few days and was given a lifting restriction for two weeks.

After the accident in July 2010, claimant was treated mainly for her neck and shoulder injuries, although records indicate at times she complained of pain in her back. Dr. Pat Do was authorized to treat her neck, back and bilateral shoulders. He treated claimant's shoulders and referred claimant to Dr. Camden Whitaker for treatment of her neck and conservative treatment for her back. Dr. Whitaker eventually recommended surgery to claimant's low back. When asked by respondent to give a causation opinion concerning claimant's low back condition, Dr. Whitaker stated:

I believe it is her preexisting condition or the natural probable consequences of her preexisting condition. I believe that the medical condition is a result of normal activities of everyday living and natural aging process.¹

The ALJ ordered claimant to be examined by Dr. Jeanette Salone. After examining claimant, Dr. Salone opined:

I do not believe that the patient's complaints of back pain are related at all to the incident on 7-2-2010 because the patient has quite an extensive history of low back pain. Several doctor visits ranging many years are documented in the medical records.²

In her deposition, Dr. Salone further stated the July 2, 2010, did not aggravate or exacerbate claimant's preexisting low back condition.

PRINCIPLES OF LAW

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice is given or claim timely made; and (4) whether certain defenses apply. These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested.³ When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁴

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

¹ P.H. Trans. (June 20, 2012), Cl. Ex. 1 at 3.

² Salone Depo., Ex. 2 at 6.

³ See K.S.A. 44-551.

⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁷

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁸ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁰

⁵ K.S.A. 2010 Supp. 44-501(a).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁷ *Id.* at 278.

⁸ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011); *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁰ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997); *Claphan v. Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180, rev. denied 228 Kan. 806 (1980).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS

1. Jurisdiction

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?¹³

Claimant identified no issues in the Application for Review that confers jurisdiction on the Board on an appeal from a preliminary hearing. The ALJ is authorized by K.S.A.44-534a to award or deauthorize ongoing medical treatment at a preliminary hearing. Thus, those issues would be non-jurisdictional on appeal from a preliminary hearing.

However, at the core of the ALJ's preliminary order is the premise that the need for medical treatment arises from claimant's preexisting injury and not from her injuries suffered with respondent. Respondent disputes whether claimant's current problems arise out of and in the course of her employment with respondent or argues that claimant's need for medical treatment is related to a preexisting condition. That is an issue over which the Board does take jurisdiction on appeal from a preliminary hearing order.¹⁴ As such, this Board Member finds that the Board has jurisdiction to review this matter.

¹¹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹² K.S.A. 2010 Supp. 44-555c(k).

¹³ K.S.A. 44-534a(a)(2).

¹⁴ *King v. DJ Engineering, Inc.*, Docket No. 1,034,292, 2007 WL 2937786 (Kan. WCAB Sept. 12, 2007).

2. Medical Treatment

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.¹⁵ The issue is whether claimant has proved by a preponderance of credible evidence that she suffered an aggravation, acceleration or intensification of her preexisting condition that has caused her current need for medical treatment.

It is well documented in the record that claimant suffered from back and neck pain prior to her alleged work-related injury. On October 10, 2005, claimant completed an accident report relating to an injury incurred while moving furniture wherein she wrote that her lower back, hips, leg, shoulder blade and neck hurt.

Claimant was diagnosed with low back pain with radiculopathy by Dr. Schmidt in February 2006 after she slipped on ice on January 13, 2006. An MRI taken February 2, 2006, showed a small focal posterior central disk protrusion at L5-S1 with mild effacement to the anterior thecal sac and degenerative disk disease at L5-S1. Claimant received at least three lumbar steroid injections in 2006. She was also referred to Dr. Henry, a neurosurgeon, as a result of the January 2006 injury. More recently, claimant saw Dr. Albright and was placed on temporary restrictions for complaints of low back pain on April 6, 2010, approximately three months prior to this injury.

Dr. Whitaker provided a letter wherein he stated that claimant's current need for treatment was the natural consequence of her preexisting condition. Dr. Salone testified that claimant's back complaints were not caused, aggravated or exacerbated by the July 2, 2010 accident. Although Dr. Salone's testimony was inconsistent at times, her final opinion was that claimant sustained no back injury resulting from the work-related accident.

CONCLUSION

Based upon the foregoing, this Board Member finds that claimant did not suffer an injury to her low back on July 2, 2010.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 24, 2013, is affirmed.

¹⁵ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. at Syl. ¶ 2; see *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
joni@jfranklinlaw.com
secretary@jfranklinlaw.com

Gary K. Jones, Attorney for Self-Insured Respondent
gary@garyjoneslaw.com

Bruce E. Moore, Administrative Law Judge